TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1914

No. [redacted] 331

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

FREDERICK W. HVOSLEF AND WILLIAM S. WALSH, SURVIVORS OF WILLIAM BENNETT.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JANUARY 7, 1915.

(24009)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 858.

THE UNITED STATES, PLAINTIFF IN ERROR,

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FREDERICK W. HVOSLEF AND WILLIAM S. WALSH, SURVIVORS OF WILLIAM BENNETT.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 United States District Court, Southern District of New York.

FREDERIK W. HVOSLEF AND WILLIAM S. WALSH, survivors of William Bennett,
against
UNITED STATES OF AMERICA.
} Petition.

To the judges of the United States District Court, Southern District of New York:

Frederik W. Hvoslef and William S. Walsh bring this, their petition against the United States of America and respectfully show to this court as follows:

First. Your petitioners, Frederick W. Hvoslef and William S. Walsh, together with William Bennett, were a copartnership, engaged in the business of steamship brokers in the city of New York within the district aforesaid between the 1st day of July, 1898, and the 19th day of September, 1900, under the firm name of Bennett, Walsh and Company. Thereafter said William Bennett died, and your petitioners are the sole surviving members of said firm. Their business and partnership residence was and is in the Borough of Manhattan, city of New York, in said district. The said Hvoslef is the liquidating partner and has sole charge of the liquidation thereof.

Second. During the said period they were assessed an internal-revenue tax, amounting in all to three hundred and fifty-nine dollars on charter parties for vessels used entirely in the export trade, which amount they afterwards, at various times during the period mentioned, paid to and it was collected by Charles H. Treat, collector of internal revenue of the United States for the second district of New York, in and by the purchase of documentary stamps of that amount which were affixed by petitioners to said charter parties.

2 Third. The said documentary stamps were required by the said collector to be affixed to said charter parties. Each of the said charter parties by its terms provided for the export of an entire cargo of products and merchandise from the United States to foreign ports. Under the terms of said charter parties said products and merchandise actually were exported from ports in the United States to foreign ports. Said requirement of the said collector was made in pursuance of the war revenue act of Congress of the United States, which was approved June 13, 1898, by which said act it was enacted that on every charter party, contract or agreement for the charter of any ship or vessel or steamer there should be levied, collected, and paid, if the registered tonnage of such ship or vessel or steamer did not exceed 300 tons, a tax of three dollars; that if such tonnage exceeded 300 tons and did not exceed 600 tons, the tax should be five dollars; if the tonnage exceeded 600 tons, the tax should be ten dollars. Said act further enacted that an adhesive stamp, denoting said tax, should be affixed to each such charter

party. The tonnage of each of the steamers mentioned in the said several contracts or agreements for the charter of said steamers exceeded 600 tons.

Fourth. The said requirements of the said war-revenue act were in violation of the ninth section of the first article of the Constitution of the United States, which provides: "No tax or duty shall be laid on articles exported from any State." The said revenue stamps so affixed were a tax upon the export of the goods exported in the said steamers under and pursuant to the provisions of the said charter parties. The said charter parties were declared by said act to be invalid and of no effect unless the said stamps were affixed thereto, and the parties to said charter party were liable to
3 punishment by fine or imprisonment for failure to affix such stamps.

Fifth. On the 27th day of July, 1912, an act was passed by the Congress of the United States and approved by the President, which enacted as follows:

"An Act Extending the time for the repayment of certain war-revenue taxes erroneously collected.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected under the provisions of section twenty-nine of the act of Congress approved June thirteenth, eighteen hundred and ninety-eight, known as the war-revenue tax, or of any sums alleged to have been excessive, or in any manner wrongfully collected under the provisions of said act may be presented to the Commissioner of Internal Revenue on or before the first day of January, nineteen hundred and fourteen, and not thereafter.

"SEC. 2. That the Secretary of the Treasury is hereby authorized and directed to pay, out of any moneys of the United States not otherwise appropriated, to such claimants as have presented or shall hereafter so present their claims, and shall establish such erroneous or illegal assessment and collection, any sums paid by them or on their account or in their interest to the United States under the provisions of the act aforesaid."

Sixth. In accordance with the provisions of the said last-mentioned act, your petitioners did present their claim for the refunding of said tax so as aforesaid illegally assessed and collected to the Commissioner of Internal Revenue on or about the 26th day of October, 1912, and the said Commissioner of Internal Revenue thereupon directed that said claim should be filed with the collector to whom the taxes were paid; and your petitioners were instructed that he would enter the same on his record and cause examination to be made and certify the same to the office of the Commissioner of Internal Revenue for consideration. Thereupon your petitioners did file a claim in writing, duly sworn to in accordance with the regulations of the said Commissioner of Internal Revenue, with the collector of internal revenue

for the Second District of New York, in which district and to the collector whereof the said taxes were paid. Your petitioners are informed and believe that he did enter the same on his record
4 and cause examination to be made and certified that the schedule attached to the said claim contained true and accurate statements of the matters and things therein set forth and specified accurately the value of cancelled documentary stamps attached to the charter parties, and he accordingly certified the claim to the office of the said commissioner for consideration. Thereupon on or about the —— day of November, 1912, your petitioners again presented the said claim to the said commissioner and demanded that he allow and approve the same and present the same for payment to the Secretary of the Treasury, pursuant to the provisions of said last-mentioned act. A copy of said claim and the schedules attached thereto is hereto annexed. The said Commissioner of Internal Revenue, as petitioners are informed and believe, refused to approve the said claim or to transmit the same to the Secretary of the Treasury for payment on the ground that he claimed that the last-mentioned act did not apply to stamp taxes.

Wherefore your petitioners demand judgment against the United States of America for three hundred and fifty-nine dollars, and that the Secretary of the Treasury thereof be directed, by the judgment of this court, to pay, out of any moneys of the United States not otherwise appropriated, to the petitioners the said sums paid by them on their account to the United States under the provisions of section 29 of the act of Congress approved June 13, 1898, known as the war revenue act as aforesaid, and that your petitioners may have such other relief as may be just, together with the costs of this court.

EVERETT P. WHEELER,
Of Counsel.

HAIGHT, SANDFORD & SMITH,
Attys. for Petitioners.

5 SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

Frederik W. Hvoslef, being duly sworn, deposes and says: I am one of the petitioners herein. I have read the foregoing petition, and know the contents thereof, and the same is true to my own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters, I believe it to be true.

FREDERIK W. HVOSLEF.

Sworn to before me this 10th day of February, 1913.

[SEAL.]

SIDNEY I. TREAT,
Notary Public, New York County. #12.

6 STATE OF NEW YORK,
County of New York.

Frederik W. Hvoslef, of No. 18 Broadway, city of New York, and the State and county aforesaid, being duly sworn according to

law, deposes and says that he is a member of the firm of Bennett, Walsh & Company; that they were engaged in the business of steamship brokers; that between the 1st day of July, 1898, and the 19th day of September, A. D. 1900, they were assessed an internal-revenue tax of three hundred sixty-two and no/100 dollars on charter parties for vessels used entirely in the export trade, which amount they afterwards, at various times during the period mentioned, paid to Charles H. Treat, Esq., collector of internal revenue for the second district of New York, and which amount, as this deponent verily believes, should be refunded for the following reasons, viz:

Documentary stamps were unlawfully required to be affixed to said charter parties which provides for the export of an entire cargo of products and merchandise from the United States to foreign ports, and under the terms of which said products and merchandise actually were exported from ports of the United States to foreign ports, said requirement being contrary to the provision of the Constitution of the United States.

Deponent further says that the proof of claim for the said amount is hereto annexed under the act of July 27, 1912, for the repayment of such taxes as were illegally collected.

And this deponent now claims that, by reason of the payment of the said sum of three hundred sixty-two and no/100 dollars,
7 they are justly entitled to have the sum of three hundred sixty-two and no/100 dollars refunded, and they now ask and demand the same.

And this deponent further makes oath that the said claimant is not indebted to the United States in any amount whatever, and that no claim has heretofore been presented for the refunding of the above amount, or any part thereof.

FREDERIK W. HVOSLEF.

Sworn to and subscribed before me this 13th day of November, A. D. 1912.

HARRY M. HEWITT,
Notary Public, New York Co.

8 *Schedule of charter parties executed for vessels used in the carrying of exports, to each of which documentary stamps of the value stated were affixed by Bennett, Walsh & Company, of the city of New York.*

Date of charter party.	Name of vessel.	Amount of documentary stamps affixed.	Time when loaded.	Port from which sailed.	Destination of vessel.
July 2, 1898	Sch. Jas. Judge	$10	Jul-Aug. 1898	Virginia	Guantanamo.
" 7, "	" Talofa	10	" " "	"	"
" 7, "	" Wm. McKay	3	" " "	New York	Samana.
" 8, "	SS. Indra	10	Aug.-Sept. "	Norfolk	Manila.
" 11, "	" Carara	10	Jul-Aug-Sept. "	"	Honolulu.
" 16, "	Ship Susquehanna	10	Jul-Aug. "	"	Manila.
" 18, "	" Vigilant	10	" " "	"	"
" 18, "	SS. Amyl	10	July "	"	St. Vincent.
" 28, "	" Strathavon	10	Jul-Aug. "	"	Cape Verde.

Schedule of charter parties executed for vessels used in the carrying of exports, to each of which documentary stamps of the value stated were affixed by Bennett, Walsh & Company, of the city of New York.—Continued.

Date of charter party.	Name of vessel.	Amount of documentary stamps affixed.	Time when loaded.	Port from which sailed.	Destination of vessel.
Sept. 7, 1898	Sch. Wm. F. Freen	3	October 1898	New York via Wil.	Haiti.
" 28, "	SS. Albert Dumois	10	" "	New York via Wil.	London.
Oct. 10, "	Sch. Carrie A. Lane	10	Oct.-Nov. "	Norfolk	Vera Cruz.
Dec. 17, "	" Dove	3	Jan.-Feb. 1899	Wilmington	St. Domingo
" 19, "	SS. Adula (stamp cut off)	3	December 1898	Baltimore	Kingston.
Jan. 17, 1899	" Ardandearg	10	January 1899	New York	U. K. or Continent.
Feb. 18, "	" Urd	10	February "	" "	Lisbon.
Mch. 23, "	" Tiber	10	Mch-Apr. "	Philadelphia	Kingston.
June 15, "	" King Grifford	10	Jun.-Jul "	New York	Vera Cruz.
Sept. 6, "	" Pioneer	5	September "	" "	Dunkirk.
" 25, "	" Claudius	10	October "	Pensacola	U. K. of Continent.
Oct. 14, "	" Pioneer	10	" "	Norfolk	Tampico.
Nov. 2, "	" Bermuda	10	November "	"	Kingston.
" 17, "	" Armstor	10	" "	New York	Santos.
Jan. 3, 1900	" Ardandearg	10	Jan.-Feb. 1900	" "	Aden, etc.
" 4, "	" A. R. Thorp	10	" " "	Norfolk	Pt. Spain.
Feb. 9, "	" Taft	5	Feb.-March "	"	Bermuda.
June 26, "	" Atlas	10	July "	Baltimore	Cardenas.
July 2, "	" Sylvia	10	" "	New York	Halifax.
" 8, "	" Helios	10	August "	" "	Santiago.
Aug. 9, "	" Therese	10	" "	Philadelphia	Trinidad.
Sept. 18, "	" Fri	10	Sept-Oct "	Norfolk	Halifax.
Nov. 22, "	" Santuit	10	November "	"	Port Limon.
Dec. 18, "	" Donald	5	December "	"	Kingston.
" 29, "	" Habil	5	Dec-Jan-1900-1901	"	"
Jan. 2, 1901	" Origen	10	January 1901	New York	Halifax.
Feb. 19, "	" Pioneer	10	March "	Norfolk	Kingston.
Mch. 5, 1901	" Auchenarden	10	March 1901	Philadelphia	Japan.
Apr. 8, "	" Vidar	10	April "	Norfolk	Kingston.
June 6, "	" Therese	10	June "	"	"
" 13, "	" Ardandearg	10	" "	New York	France.
Dec. 12, 1900	" Folsjo	10	December 1900	" "	Portugal.
		$359			

9 I, Walter C. Weston, a deputy collector of internal revenue for the Second District, State of New York, being duly sworn, depose and say that I have carefully compared the schedule attached to the claim of Bennett, Walsh & Company with the original charter parties in the possession of the claimant, and that said schedule contains true and accurate statements of the matters and things therein set forth and specifies accurately the value of cancelled documentary stamps attached to the charter parties; that I have personally investigated the evidence and all the statements made and set forth in the foregoing affidavit of claimant, including the purchase, value, and use of the documentary stamps therein specified, and to the best of my knowledge and belief the same are true.

(Signed) WALTER C. WESTON.

Subscribed and sworn to before me, this — day of November, 1912.

(Signed) DAVID S. WENDELL,
Deputy Collector.

(Endorsed) U. S. District Court, S. D. of N. Y. Filed Feb. 11, 1913.

10 *Demurrer.*

United States District Court, Southern District of New York.

FREDERIK W. HVOSLEF AND WILLIAM S. WALSH, SURVIVORS OF WILLIAM BENNETT, petitioners,
vs.
UNITED STATES OF AMERICA, DEFENDANT.

The United States of America, defendant above named, by Henry A. Wise, United States attorney for the Southern District of New York, its attorney, appearing herein specially and not submitting itself to the jurisdiction of this court, demurs to the petition herein on the ground that it appears on the face thereof that the court has no jurisdiction of this defendant, and also on the further ground that it appears upon the face thereof that the court has no jurisdiction of the subject of the action, and also on the further ground that the petition does not state facts sufficient to constitute a cause of action.

Dated: New York, April 8th, 1913.

HENRY A. WISE,
United States Attorney for the Southern District of New York,
Attorney for Defendant.

(Endorsed) A copy received Apr. 8, 1913, Haight, Sandford & Smith. U. S. District Court, S. D. of N. Y. Filed Apr. 8, 1913.

11 *Opinion.*

District Court of the United States, Southern District of New York.

FREDERICK W. HVOSLEF ET AL.,
vs.
UNITED STATES OF AMERICA.

On demurrer to petition.

NOYES, Circuit Judge:

The first question presented is whether the provision of the war-revenue act of 1898 imposing a tax on charter parties was constitutional. It is contended that it was unconstitutional as applied to vessels engaged in the export trade because it infringed the provision that "no tax or duty shall be laid on any articles exported from any State."

In my opinion, this constitutional question is determined by the decisions of the Supreme Court in Fairbank vs. United States, 181 U. S., 283, and United States vs. New York and Cuba Mail S. S. Co., 200 U. S. 488. If the war-revenue act were unconstitutional in imposing a tax on export bills of lading and export manifests, it would

certainly have been unconstitutional if it had imposed specifically a tax on charter parties for vessels in the export trade. A charter party is a document by which the cargo space of a vessel is engaged. It enables export articles to be transported. A tax upon it is a
12 burden upon exportation as much as if it were imposed upon the articles carried in the vessels chartered. This conclusion is, apparently, not questioned by the Government. But it is pointed out that the statute does not specifically tax foreign charter parties but applies to all ships wherever bound, and upon this ground it is urged that the present case should be distinguished from those cited.

This contention of the Government amounts to this—that while a specific tax on export bills of lading or charters of vessels for the export trade may be unconstitutional, a tax on all bills of lading or all charter parties is valid. I can not accept this contention. A tax which directly burdens exportation is as much unconstitutional as to exportation when general as when specified terms are used. Constitutional limitations are not to be avoided by generality of language. The case is not like those cited by the Government where general taxes on merchandise have been held applicable to articles intended for export. Such articles are subject to the ordinary burdens until they actually become exports. But a charter party of a vessel for foreign trade is a means of export. It has relation only to exports, and it is free from taxation because a tax on it is a tax on exports. The statute as applied to charter parties for vessels used entirely in the export trade from the United States is held to have been unconstitutional.

The second question is whether the act of 1912, upon which the petitioner relies, gives it a right of action against the United States. While the act provides for an extension of time for the pre-
13 sentation of claims and authorizes payment by the Secretary of the Treasury, it does not in terms give a right of action in case the Secretary neglects or refuses to pay. But the broad purpose of the statute was to refund to claimants moneys illegally collected from them, and, in my opinion, it should be construed as affording the foundation for a demand against the Government. It is, accordingly, held that the petitioners have a right to sue the United States under the Tucker Act upon their demand as founded upon a law of Congress. Indeed there would be much ground for holding that such right would exist without the 1912 statute. When moneys are wrongfully collected under a law of Congress it may well be that a claim for their return is founded upon a law of Congress. Christie-street Com. Co. vs. United States, 136 Fed. 326. See also Dooley vs. United States, 122 U. S. 222.[1]

The third question is whether the petitioners in failing to allege that the taxes sought to be recovered were paid under protest states a cause of action.

[1] Of course these conclusions also serve to negative the Government's further supplementary contention that the petitioner's remedy is only against the collector.

As a general rule it is undoubtedly settled that in order to recover internal-revenue taxes illegally exacted it must be shown that they were paid under protest. But as we have seen, the act of 1912 indicated an intention on the part of Congress to make restitution. It used broad language. It imposed no condition as to protest. It said
14 that "all" claims for taxes illegally assessed might be presented, not merely claims where payment has been made under protest. Moreover, to make it the duty of the Secretary to pay the claimants after presenting their claims were required to establish only "such erroneous or illegal assessments and collection." The act is, in my opinion, complete in itself and gives claimants a right of action regardless of the requirements in case of a suit under other conditions. See Campbell vs. United States, 107 U. S. 407; Thacher vs. United States, 149 U. S. 902.

The remaining contentions of the Government in support of the demurrer are regarded as not well founded.

The demurrer is overruled.

(Endorsed) U. S. District Court, S. D. of N. Y. Filed May 26, 1913.

15 *Order on demurrer.*

At a stated term of the United States District Court held in and for the Southern District of New York at the court room in the post-office building, borough of Manhattan, city of New York, this 12th day of June, 1913.

Present: Hon. Walter C. Noyes, U. S. Circuit Judge.

FREDERICK W. HVOSLEF AND WILLIAM S. WALSH, SURVIVORS OF WILLIAM BENNETT,
against
UNITED STATES OF AMERICA.

This cause having regularly come on for trial upon the defendant's demurrer to the petitioners' petition at a stated term of this court held on the 18th day of April, 1913, and the said demurrer having been argued and submitted by the counsel for the respective parties, and after due deliberation, the said demurrer having been overruled.

Ordered, that the demurrer to the petition herein be, and the same is hereby, overruled and that the petitioners have judgment upon the same for the amount demanded in the petition unless the defendant shall within ten days from this date file an answer to said petition, leave to do which is hereby granted.

WALTER C. NOYES,
United States Circuit Judge.

(Endorsed) U. S. District Court, S. D. of N. Y. Filed Jun. 14, 1913.

16 *Answer.*

United States District Court, Southern District of New York.

FREDERIK W. HVOSLEF AND WILLIAM S. WALSH, SURVIVORS OF WILLIAM BENNETT, plaintiffs,

vs.

UNITED STATES OF AMERICA, DEFENDANT.

The defendant above named, by H. Snowden Marshall, United States attorney for the Southern District of New York, its attorney, appearing specially herein and not submitting itself to the jurisdiction of this court or waiving its contention that this court has no jurisdiction either of the defendant or of the subject matter of the petition herein, for its answer thereto alleges on information and belief as follows:

First. It denies each and every allegation in the said petition contained.

For a separate defense.

Second. It alleges that this court has no jurisdiction either of this defendant or of the subject-matter of the petition herein.

17 Wherefore, the defendant demands judgment, dismissing the petition herein, together with its costs and disbursements.

H. SNOWDEN MARSHALL,
U. S. Attorney for the Southern District of New York,
Attorney for Defendant.

Office and P. O. address: Room 50, U. S. Court & Post Office Building, Borough of Manhattan, City of New York.

18 STATE OF NEW YORK, COUNTY OF NEW YORK,
Southern District of New York.

Addison S. Pratt, being duly sworn, deposes and says that he is an assistant to the United States attorney for the Southern District of New York, the attorney for the defendant in the within entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

That the reason why this verification is made by deponent and not by defendant is that defendant is a corporation sovereign.

The sources of deponent's information and the grounds of his belief are official communications received from the Internal Revenue Department of the United States and from the Attorney General of the United States.

ADDISON S. PRATT.

Sworn to before me this 3d day of July, 1913.

[SEAL.]

FREDERICK L. CAMPBELL,
Notary Public, Kings County, No. 187.

Certificate filed in New York County. No. 61, New York County. Register's No. 5164, New York County. Register's No. 6178, Kings County. My commission expires March 30, 1915.

(Endorsed) U. S. District Court, S. D. of N. Y. Filed July 5, 1913.

19 United States District Court, Southern District of New York.

FREDERICK W. HVOSLEF AND WILLIAM S. WALSH, survivors of William Bennett, *against* UNITED STATES OF AMERICA. } Stipulation and amended findings.

It is hereby stipulated that the findings in this case be amended in accordance with the amended findings annexed hereto and that such amended findings be substituted for the original findings heretofore made herein, with like force and effect as if such amended findings had been originally made by the court. This consent is not to be taken as extending in any way the time to sue out a writ of error to review the judgment entered upon said findings.

(Sgd.) HAIGHT, SANDFORD & SMITH,
Attorneys for Petitioners.

(Sgd.) H. SNOWDEN MARSHALL,
U. S. Attorney.

20 United States District Court, Southern District of New York.

FREDERICK W. HVOSLEF AND WILLIAM S. WALSH, survivors of William Bennett, *against* UNITED STATES OF AMERICA. } Amended findings.

The issues in the above-entitled action having duly come on for trial before me on the 28th day of August, 1913, and a stipulation waiving trial by jury having been duly signed by the respective parties, through their duly authorized attorneys, and filed in the office of the clerk of this court, and the pleadings and the proofs of the respective parties having been duly considered, I make the following

Findings of fact.

First. At all the times between July 1st, 1898, and July 1st, 1901, the petitioners, Frederick W. Hvoslef and William S. Walsh, together with William Bennett, were copartners engaged in the business of steamship brokers at 18 Broadway, Borough of Manhattan, city of New York, in this district, under the firm name of Bennett, Walsh & Company. Thereafter, and prior to the beginning of this action, the said William Bennett died, and the petitioners are the sole sur-

viving members of said firm. The petitioner, Frederick W. Hvoslef, is the liquidating partner of the firm of Bennett, Walsh & Company, and has sole charge of the liquidation thereof.

21 Second. By sec. 25 of the so-called war-revenue act of Congress of the United States, approved on June 13th, 1898, a stamp tax upon charter parties was levied or sought to be levied, the statute providing as follows:

"Charter party: Contract or agreement for the charter of any ship or vessel or steamer, or any letter, memorandum, or other writing between the captain, master, or owner, or person acting as the agent of any ship or vessel or steamer, and any other person or persons for or relating to the charter of such ship or vessel or steamer, or any renewal or transfer thereof, if the registered tonnage of such ship or vessel or steamer does not exceed 300 tons, $3.00.

"Exceeding 300 tons, not exceeding 600 tons, $5.00.

"Exceeding 600 tons, $10.00." (30 Stats. L., 460.)

Other provisions of said statute declared such charter parties to be invalid unless so stamped, and provided that the parties thereto should be punishable by fine and imprisonment for failure to affix said stamp.

Third. By decisions and rulings in the Department of the Treasury, made with regard to said section 25 of said act, the same was interpreted and construed as applicable solely to charter parties for foreign vessels and domestic vessels registered in the foreign trade, and by said statute, decisions, and rulings the said firm of Bennett, Walsh & Company was required to make payment of the said stamp tax upon charter parties for vessels so registered and carrying export cargoes from ports in the States of the United States to foreign ports.

Fourth. In pursuance of said requirements the said firm of Bennett, Walsh & Company, without protest, paid internal-revenue taxes amounting in all to three hundred fifty-three dollars ($353) on charter parties for voyages from ports in various States of the United States to foreign ports, on which voyages cargoes of goods were to be, and were in fact, carried only and exclusively from

22 ports in said States to foreign ports, and were all exported from the ports severally mentioned in Schedule A, hereto attached, to the foreign ports or places mentioned therein. Said amount was paid by Bennett, Walsh & Company to the collector of internal revenue of the United States for the second district of New York by purchasing from him, and affixing to such charter parties, documentary stamps, pursuant to said act of Congress approved June 13th, 1898. Said stamps in the amounts specified in Schedule A, hereto annexed, were so affixed and thereafter duly canceled to charter parties of the vessels specified in said schedule and bearing the dates therein specified, said vessels and each of them being under said charters engaged solely for the carriage of cargo exported from the ports in the said States to the foreign ports and countries stated in said schedule, and the said stamps were affixed

in denominations corresponding to the tonnage of said vessels, in accordance with the provisions of the statute. Said charters were actually performed and the cargoes therein specified were actually carried by said vessels from the said ports in the said States severally and exported therefrom to the said foreign ports and countries, and the said vessels on those voyages were engaged exclusively in the carriage of cargo from the said States to foreign ports and in the export trade. All said vessels were either foreign vessels or domestic vessels registered in the foreign trade.

Fifth. On June 27th, 1912, an act was passed by the Congress of the United States and approved by the President, which provided as follows:

"An Act Extending the time for the repayment of certain war-revenue taxes erroneously collected.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected under the provisions of
23 section twenty-nine of the act of Congress, approved June thirteenth, eighteen hundred and ninety-eight, known as the war-revenue tax, or of any sums alleged to have been excessive, or in any manner wrongfully collected under the provisions of said act may be presented to the Commissioner of Internal Revenue on or before the first day of January, nineteen hundred and fourteen, and not thereafter.

"SEC. 2. That the Secretary of the Treasury is hereby authorized and directed to pay, out of any moneys of the United States not otherwise appropriated, to such claimants as have presented or shall hereafter so present their claims and shall establish such erroneous or illegal assessment and collection, any sums paid by them or on their account or in their interest to the United States under the provisions of the act aforesaid."

Sixth. In accordance with the provisions of the said last-mentioned act and pursuant to the letter of the Commissioner of Internal Revenue, which has been marked "Exhibit 2," the petitioners presented and filed their claim for the refunding of the taxes paid as aforesaid with the collector of internal revenue for the second district of New York in the month of November, 1912. Said claim was filed in writing and was sworn to in accordance with the regulations of the Commissioner of Internal Revenue.

Seventh. The said collector thereupon entered the said claim on his record and caused an examination of said claim and of the original charter parties and of the stamps thereon to be made, and certified in due form that the schedule attached to said claim (a copy whereof is attached to the petition hereiff) contained correct statements and accurately specified the value of the cancelled stamps, and accordingly he forwarded the claim so certified to the office of the Commissioner of Internal Revenue and the claim was thereby presented to the said commissioner.

Eighth. On or about the 22nd day of January, 1913, the said
24 Commissioner of Internal Revenue rejected the said claim and declined to allow or approve the same, or to transmit the same for payment to the Secretary of the Treasury, pursuant to the provisions of the act of July 27th, 1912, on the ground that the said act did not apply to said claim, and the defendant, the United States of America, refused to pay the same.

I also find the following conclusions of law:

First. This court has jurisdiction of the parties and of the subject matter of this action.

Second. The war-revenue act of June 13th, 1898, in so far as it imposed a tax on the said charter parties, which were exclusively for the carriage of cargo from ports in the States of the United States to foreign ports, imposed a tax upon said cargoes and upon their exports in violation of the ninth section of the first article of the Constitution of the United States, which provides: "No tax or duty shall be laid on articles exported from any State."

Third. The petitioners duly presented their claim to the Commissioner of Internal Revenue in accordance with the act of July 27th, 1912, and the same was rejected by him and by the defendant, the United States of America.

Fourth. The petitioners are entitled to judgment against the United States in the sum of $353.

(Signed) GEO. C. HOLT,
United States District Judge.

25 *Schedule A.*

Date of charter party.	Name of vessel.	Amount of documentary stamps affixed.	Port from which sailed.	Destination of vessel.
1898.				
July 2,	Sch. Jas. Judge	$10	Virginia	Guantanamo.
" 7,	" Talofa	10	"	"
" 7,	" Wm. McKay	3	N. Y. via Wil	Samana.
" 21,	SS. Indra	10	Norfolk	Manila.
" 11,	" Carars	10	"	Honolulu.
" 16,	Ship Susquehanna	10	"	Manila.
" 18,	" Vigilant	10	"	"
" 18,	SS. Amyl	10	"	St. Vincent.
July 26,	SS. Strathavon	10	"	Cape Verde.
Sept. 28,	" Albert Dumois	10	N. Y. via Wil	London.
Oct. 10,	Sch. Carrie A. Lane	10	Norfolk	Vera Cruz.
1899.				
Jan. 17,	SS. Ardandearg	10	New York	U. K. or Continent.
Feb. 18,	" Urd	10	" "	Lisbon.
Mch. 23,	" Tiber	10	Philadelphia	Kingston.
June 12,	" King Grifford	10	New York	Vera Cruz.
Sept. 6,	" Pioneer	5	" "	Dunkirk.
" 25,	" Claudius	10	Pensacola	U. K. or Continent.
Oct. 14,	" Pioneer	10	Norfolk	Tampico.
Nov. 2,	" Bermuda	10	"	Kingston.
" 17,	" Armstor	10	New York	Santos.
1900.				
Jan. 3,	" Ardandearg	10	New York	Aden, etc.
Jan. 4,	" A. R. Thorp	10	Norfolk	Pt. Spain.
Feb. 9,	" Taff	5	"	Bermuda.
June 26,	" Atlas	10	Baltimore	Cardena.
July 3,	" Sylvia	10	New York	Halifax.
" 17,	" Helios	10	" "	Saigon.

Schedule A—Continued.

Date of charter party.	Name of vessel.	Amount of documentary stamps affixed.	Port from which sailed.	Destination of vessel.
1898.				
Aug. 9,	SS. Therese	10	Philadelphia	Trinidad.
Sept. 18,	" Fri	10	Norfolk	Halifax.
Nov. 22,	" Santuit	10	"	Port Limon.
Dec. 18,	" Donald	5	"	Kingston.
" 29,	" Habil	5	"	"
1901.				
Jan. 2,	" Origen	10	New York	Halifax.
Feb. 19,	" Pioneer	10	Norfolk	Kingston.
Mch. 5,	" Auchenarden	10	Philadelphia	Japan.
Apr. 8,	" Vidar	10	Norfolk	Kingston.
June 6,	" Therese	10	"	"
June 13,	" Ardendearg	10	New York	France.
1900.				
Dec. 13,	" Folsjo	10	New York	Portugal.
		$353		

(Endorsed) U. S. District Court, S. D. of N. Y., filed Dec. 4, 1913.

26 United States District Court, Southern District of New York.

FREDERICK W. HVOSLEF AND WILLIAM S. WALSH, SURVIVORS OF WILLIAM BENNETT,
against
UNITED STATES OF AMERICA.

The issues in this action having been duly brought on for trial and a stipulation executed by the respective parties by their duly authorized attorneys waiving trial by jury having been duly filed and the action having come on for trial before the Honorable George C. Holt, district judge, without a jury at a stated term of this court, held on the 28th day of August, 1913, at the post-office building, in the said district, and the petitioners appearing by Haight, Sandford & Smith, their attorneys, and the defendant by H. Snowden Marshall, Esq., its attorneys, and the issues having been duly tried on the pleadings and proofs of the respective parties, and the court having duly made and filed its findings of fact and its conclusions of law, and having found the petitioners entitled to judgment in the sum of three hundred fifty-three dollars ($353.00);

Now, on motion of Haight, Sandford & Smith, attorneys for the petitioners, it is

Adjudged that the petitioners, Frederick W. Hvoslef and William S. Walsh, as surviving partners of the firm of Bennett, Walsh & Company, recover of the defendant United States of America the sum of three hundred fifty-three dollars ($353.00).

Judgment this 28 day of August, 1913.

[SEAL.] ALEX. GILCHRIST, Jr., *Clerk.*

(Endorsed) U. S. District Court, S. D. of N. Y. Filed Aug. 28, 1913, 3.40 p. m.

27 United States District Court, Southern District of New York.

FREDERICK W. HVOSLEF AND WILLIAM S. WALSH, SURVIVORS OF WILLIAM BENNETT,

vs.

UNITED STATES OF AMERICA.

Assignment of errors.

Now comes the United States of America, complaining herein by H. Snowden Marshall, United States attorney for the Southern District of New York, and assigns errors in the decision of the said district court as follows:

First. Said court erred in holding that it had jurisdiction of the parties and the subject matter of this action.

Second. Said court erred in holding that the war-revenue act of June 13, 1898, in so far as it imposed a tax on charter parties for vessels carrying cargoes exported from ports in the United States to foreign ports imposed a tax upon the said cargoes and upon their export, in violation of the 9th section of the first article of the Constitution of the United States, which provides:

"No tax or duty shall be laid on cargoes exported from any State."

28 Third. Said court erred in holding that the petition of the said plaintiffs or petitioners stated facts sufficient to constitute a cause of action.

Fourth. Said court erred in holding that it was not necessary for the plaintiffs or petitioners to allege and prove that a protest was made at the time when said stamp tax was paid.

Fifth. Said court erred in holding that under the act of June 27, 1912, said plaintiffs or petitioners were entitled to recover from the United States of America the amount paid by them for said stamps under the provisions of sec. 25 of said act of June 13, 1898.

Sixth. Said court erred in holding that the act of June 27, 1912, provided for the refund of internal-revenue taxes paid under the provisions of any section of said act of June 13, 1898, other than those paid under section 29.

Seventh. Said court erred in holding that the plaintiffs or petitioners were entitled to judgment against the United States of America in the sum of three hundred and fifty-three dollars ($353.00).

Eighth. Said court erred in entering judgment against this defendant, and in not entering judgment in favor of this defendant and against the plaintiffs, dismissing their complaint.

Wherefore, the defendant prays that for the errors aforesaid judgment may be reversed.

H. SNOWDEN MARSHALL,
United States Attorney for the Southern District of New York,
Attorney for Defendant.

(Endorsed) U. S. District Court, S. D. of N. Y. Filed Dec. 8, 1913.

29 United States District Court, Southern District of New York.

FREDERIK W. HVOSLEF AND WILLIAM S. WALSH, SURVIVORS OF WILLIAM BENNETT,

v.

UNITED STATES OF AMERICA.

Petition for writ of error.

Now comes H. Snowden Marshall, United States attorney for the Southern District of New York and attorney for the defendant herein, and says that on the 28th day of August, 1913, this court entered judgment herein in favor of the plaintiff and against this defendant, in which judgment and proceedings, had prior thereunto in this cause, certain errors were committed to the perjudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

H. SNOWDEN MARSHALL,
U. S. Attorney.

Dated: December 8th, 1913.

(Endorsed) U. S. District Court, S. D. of N. Y. Filed Dec. 8, 1913.

30 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court of the United States for the Southern District of New York before you, between Frederick W. Hvoslef and William S. Walsh, survivors of William Bennett, and the United States of America, a manifest error hath happened to the great damage of the said United States of America, as by its complaint appears. We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same in the said Supreme Court at Washington within the 30 days

from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States Supreme Court, the eighth day of December, in the year of our Lord one thousand nine hundred and thirteen.

[SEAL.]

ALEX. GILCHRIST, Jr.,
Clerk of the District Court.

Allowed by
GEO. C. HOLT,
United States District Court.

31 (Indorsed:) L 10-249. U. S. Supreme Court. The United States of America, Plaintiff-in-Error, versus Frederick W. Hvoslef and William S. Walsh, survivors of William Bennett, Defendant-in-Error. Original writ of error. H. Snowden Marshall, United States attorney, attorney for U. S. Due service of a copy of the within is hereby admitted. New York, Dec. 8, 1913. Attorney for plaintiff in error. (Stamped:) U. S. District Court, S. D. of N. Y. Filed Dec. 9, 1913. Copy received Dec. 8, 1913. Haight, Sandford & Smith.

32 By the Honorable George C. Holt, one of the Judges of the District Court of the United States for the Southern District of New York.

To Fredrick W. Hvoslef and William S. Walsh, survivors of William Bennett.

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at the Capitol, in the city of Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Southern District of New York, wherein the United States is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the city of New York, in the district above mentioned, this eighth day of December, in the year of our Lord one thousand nine hundred and thirteen, and of the independence of the United States the one hundred and thirty-eighth.

GEO. C. HOLT,
Judge of the District Court of the United States for the Southern District of New York.

33 (Indorsed:) L 10-249. U. S. Supreme Court. United States of America, Plaintiff-in-Error, versus Frederick W.

Hvoslef and William S. Walsh, survivors of William Bennett, Defendant-in-Error. Original citation. H. Snowden Marshall, United States attorney, attorney for U. S. Due service of a copy of the within is hereby admitted. New York, Dec. 8, 1913. Attorney for defendant in error. (Stamped:) U. S. District Court, S. D. of N. Y. Filed Dec. 9, 1913. A copy received Dec. 8, 1913. Haight, Sandford & Smith.

34 *Stipulation.*

United States District Court, Southern District of New York.

FREDERICK W. HVOSLEF AND WILLIAM S. WALSH, SURVIVORS OF WILLIAM BENNETT,
against
UNITED STATES OF AMERICA.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the record herein upon the writ of error to the Supreme Court of the United States shall consist of the following papers:

1. Petition, including schedule annexed thereto.
2. Demurrer.
3. Opinion of Noyes, J., overruling demurrer.
4. Order overruling demurrer.
5. Answer.
6. Amended findings and stipulation, including exhibit referred to therein.
7. Judgment.
8. Assignment of errors.
9. Petition for writ of error.
10. Writ of error.
11. Citation.
12. This stipulation.

Dated: New York, December 22, 1913.

HAIGHT, SANDFORD & SMITH,
Attorneys for Petitioner.
H. SNOWDEN MARSHALL,
Attorney for Defendant.

(Endorsed) U. S. District Court, S. D. of N. Y. Filed Dec. 23, 1913.

35 UNITED STATES OF AMERICA,
Southern District of New York, ss:

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
FREDERIK W. HVOSLEF AND WILLIAM S. WALSH, SURVIVORS OF WILLIAM BENNETT, defendants in error.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York,

do hereby certify that the foregoing is a correct transcript of the record of the said district court in the above-entitled matter in the form agreed on by the parties.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, this third day of January, in the year of our Lord one thousand nine hundred and fourteen, and of the independence of the said United States the one hundred and thirty-eighth.

[SEAL.] ALEX. GILCHRIST, Jr., *Clerk.*

(Indorsement on cover:) File No. 24,009. S. New York, D. C. U. S. Term No. 858. The United States, plaintiff in error, vs. Frederick W. Hvoslef and William S. Walsh, survivors of William Bennett. Filed January 7th, 1914. File No. 24,009.

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Office Supreme Court, U. S.
FILED
NOV 7 1914
JAMES D. MAHER
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, PLAINTIFF IN ERROR, *vs.* FREDERICK W. HVOSLEF and WILLIAM S. WALSH, Survivors of WILLIAM BENNETT.	No. 331.
THE THAMES AND MERSEY MARINE INSURANCE COMPANY, LIMITED, PLAINTIFF IN ERROR, *vs.* THE UNITED STATES.	No. 616. Motion to Advance.

Come now the defendants in error, Frederick W. Hvoslef and William S. Walsh, Survivors of William Bennett, in the cause first entitled as above, and The Thames and Mersey Marine Insurance Company, Limited, plaintiff in error, in the cause secondly entitled as above, by their counsel, Everett P. Wheeler, in their behalf, and move

4 the Court on the records duly filed herein, and on the annexed affidavit of Henry M. Hewitt, to advance the hearing of the above entitled causes and set the same for argument at some time during the present term of this Court, and to grant to the said parties such other and further relief as they may be entitled to receive.

EVERETT P. WHEELER,
Of Counsel for Frederick W. Hvoslef and others.

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SUPREME COURT OF THE UNITED STATES, 7

OCTOBER TERM, 1914.

THE UNITED STATES, PLAINTIFF IN ERROR, *vs.* FREDERICK W. HVOSLEF and WILLIAM S. WALSH, Survivors of WILLIAM BENNETT.	No. 331.
THE THAMES AND MERSEY MARINE INSURANCE COMPANY, LIMITED, PLAINTIFF IN ERROR, *vs.* THE UNITED STATES.	No. 616.

8

UNITED STATES OF AMERICA, Southern District of New York, } ss.: 9

HENRY M. HEWITT, being duly sworn, deposes and says:

1. I am an attorney at law in the office of the firm of Haight, Sandford & Smith, attorneys at law in the City of New York. They were the attorneys for the defendants in error in the action first entitled as above, and for the plaintiff in error in the action secondly entitled as above, in

10 the District Court of the United States for the Southern District of New York, and I am familiar with the said cases and with the proceedings therein. The cause first entitled as above which will hereinafter be described as the Hvoslef case, was begun in said last mentioned Court February 10th, 1913, by the filing of a petition in said Court, asking for the refund of certain stamp taxes which had been demanded and received by the United States of America, and claimed under the provisions of the War Revenue Act of Congress approved June 13th, 1898, by which Act it was enacted that on every
11 charter-party there should be levied, collected and paid a certain tax therein specified. The said petition alleged that the said requirement of said War Revenue Act was in violation of the Ninth Section of the First Article of the Constitution of the United States, which provides—"No tax or duty shall be laid on articles exported from any state." The charter-parties upon which taxes were paid by the defendants in error, were alleged in said petition to be for vessels used entirely in the export trade from States of the United States.

12 2. The said petition was filed and the said action brought pursuant to an act of Congress approved July 27th, 1912. The said action was first heard before Honorable Walter C. Noyes, United States Circuit Judge, who delivered an opininon in favor of the plaintiffs in the Court below and held the taxes on charter-parties of vessels for export of goods from the United States to foreign countries to be unnconstitutional. The cause was afterwards heard before Honorable George C. Holt, United States District Judge. Upon the

pleadings and proofs he directed judgment be entered in favor of the plaintiffs for $353. To review the judgment so entered, a writ of error was sued out by the United States and the record in said suit was filed in this Court January 7, 1914. 13

3. The cause secondly entitled as above, which will be hereinafter described as the Thames and Mersey case, was brought by The Thames and Mersey Marine Insurance Company, in said District Court against the United States of America by a petition filed June 26th, 1914. This suit was brought pursuant to the said act of Congress approved July 27th, 1912, to recover certain revenue taxes amounting to $5,500 which had been assessed on marine policies of insurance underwritten by the petitioner, now plaintiff in error, which did insure against marine risks certain merchandise exported by the United States to foreign countries. It claimed in said petition that the provisions of the said War Revenue Act, whereby a tax was levied on every policy of marine insurance, was in violation of said section of the Constitution of the United States, so far as it applied to revenue stamps required to be paid in respect of policies of marine insurance upon articles exported from any State. The defendant demurred to said petition. The said demurrer was heard before Honorable L. Hand, District Judge, in July, 1914, who rendered an opinion that the provisions of said War Revenue Act, so far as they applied to taxes on policies of marine insurance upon articles exported, were constitutional. He thereupon ordered that the demurrer be sustained and judgment dismissing the petition was rendered in favor of the defendant August 18th, 1914. The said Thames & Mersey Company there- 14 15

upon sued out a writ of error and the record pursuant to the requirement of said writ was filed in this Court, September 4th, 1914.

4. The questions involved in these cases as to the true construction and effect of said section of the Constitution of the United States, are of great importance, not only to the parties to the litigation but to the general public, and they should therefore be decided finally by this Court at an early day. I respectfully submit that it would be in the interest of justice that the two cases should be advanced and should be heard together, inasmuch as they involve the construction and effect to be given to said section of the Constitution of the United States.

5. One of the points taken by the United States in both cases, was that the action should have been brought against the Collector of Internal Revenue and not against the United States. This contention was overruled in the Hvoslef case and was not sustained in the Thames & Mersey case. There is another case pending in this Court, Number 117 on the docket, United States, Plaintiff in Error, *vs.* Emery, Bird, Thayer Realty Company, in which this question also arises. The other questions in that case relate to the construction and effect of Section number 38 of the act of Congress entitled an act to provide revenue, etc., approved August 5th, 1909, and are entirely different from the constitutional questions which arise in the cases in which this motion is made. Inasmuch as the question of jurisdiction arises in all three cases, I respectfully submit that it would be con-

venient if the cases in which this motion is made, should be assigned to be heard after Number 117.

HENRY M. HEWITT.

Sworn to before me this 2nd day of November, 1914.

J. DEXTER CROWELL,
Notary Public,
Kings Co.
Certificate filed in N. Y. Co.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1914.

THE UNITED STATES, PLAINTIFF IN ERROR, *vs.* FREDERICK W. HVOSLEF and WILLIAM S. WALSH, Survivors of WILLIAM BENNETT.	No. 331.
THE THAMES AND MERSEY MARINE INSURANCE COMPANY, LIMITED, PLAINTIFF IN ERROR, *vs.* THE UNITED STATES.	No. 616.

TAKE NOTICE that the defendants in error in the action first above entitled, and the plaintiff in

22 error in the action secondly above entitled, will on Monday the 9th day of November, 1914, or as soon thereafter as counsel can be heard, submit to this Court for its decision thereon, the motion and affidavit of which the foregoing are a copy.

EVERETT P. WHEELER,
of Counsel for Motion.

To the Attorney General of the United States.

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Nichols v. *United States*, 7 Wall. 122, 129.	
Sybrandt v. *United States*, 19 Ct. Cl. 461.	
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United States v. *Savings Bank*, 104 U. S. 728, 734.	
This established rule is not altered by the act of July 27, 1912, 37 Stat. 240, upon which petitioners rely. The sole object of this act was simply the extension of time to January 1, 1914, for the filing of belated claims	5
2. It does not affirmatively appear that the suit was brought in the district in which the petitioners reside	10
The Tucker Act (under which this suit was brought) declares that it must be brought in the district where the plaintiff resides; and this provision as to venue is mandatory	10
Reid Wrecking Co. v. *United States*, 202 Fed. 314, 316.	

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II. The petition fails to state a cause of action. 13–21

1. There can be no recovery in the absence of any showing that the taxes were paid under protest 13

Chesebrough v. *United States*, 192 U. S. 253.
United States v. *New York & Cuba Mail S. S. Co.*, 200 U. S. 488.

And to "require" the payment of stamps upon charter parties on the part of the Treasury Department does not constitute duress, or make payment under protest unnecessary to a recovery 13

United States v. *Edmondston*, 181 U. S. 500.

2. The act of July 27, 1912, does not dispense with protest or duress as a condition precedent to a recovery 16

Chesebrough v. *United States*, *supra*.
United States v. *New York & Cuba Mail S. S. Co.*, *supra*.

3. The petition does not show that the claim for refunding was presented to the Commissioner of Internal Revenue within the statutory time 19

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1. The tax was not unconstitutional merely because it may have been measured by the cargo space of vessels employed in some instances in the export trade 21

The tax in question was measured by the tonnage of the vessels chartered, and tonnage taxes may lawfully be imposed by Congress .. 21–22

State Tonnage Tax Cases, 12 Wall. 204, 216.

And a duty on tonnage may be imposed with a view to revenue, as well as with a view to the regulation of commerce 24

Gibbons v. *Ogden*, 9 Wheat. 1, 202.
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2. The tax only incidentally and remotely affected articles exported 25
And the act imposing it does not come within the constitutional prohibition of a tax or duty on such articles 26
Armour Packing Co. v. *United States*, 209 U. S. 56, 79–80.
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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
FREDERICK W. HVOSLEF AND WILLIAM S. WALSH, survivors of William Bennett.
No. 331.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This was an action brought against the United States as defendant by Frederick W. Hvoslef and William S. Walsh, surviving partners of the firm of Bennett, Walsh and Company, to recover internal revenue taxes paid without protest under the provisions of section 25 of the War Revenue Act of June 13, 1898, c. 448, 30 Stat. 448, 460, on charter parties for vessels used entirely in the export trade.

It was contended for the petitioners (1) that the tax on such charter parties was a tax upon exports, and therefore in violation of Article I, section 9, of

the Constitution, and (2) that the refund of such taxes and the bringing of such suits was provided for by the act of July 27, 1912, c. 256, 37 Stat. 240.

A demurrer to the petition on the ground that the District Court was without jurisdiction of the defendant or the subject-matter, and on the further ground that the petition did not state facts sufficient to constitute a cause of action, was overruled, the District Court holding that none of the Government's contentions in support of its demurrer were well founded, and more especially—

First. That the War Revenue Act, as applied to charter parties for vessels used entirely in the export trade, was unconstitutional.

Second. That, notwithstanding petitioners' claim for refunding had been presented to the Commissioner of Internal Revenue and by him rejected, petitioners nevertheless had a right to sue the United States as a party defendant under the Tucker Act of March 3, 1887, 24 Stat. 505 (now section 24, paragraph 20, of the Judicial Code), upon their demand as founded upon a law of Congress.

Third. That the act of July 27, 1912, *supra*, gave to the claimants a right of action regardless of the general rule that in order to recover internal revenue taxes illegally exacted it must be shown that they were paid under protest.

Thereupon the United States filed its answer denying generally the allegations of the petition and again challenging the jurisdiction of the District Court.

After a hearing upon the facts and the law the court reached the conclusion (1) that it had jurisdiction of the parties and of the subject matter; (2) that the provision of the War Revenue Act in question was unconstitutional; (3) that the claim of petitioners had been presented to the Commissioner of Internal Revenue in accordance with the act of July 27, 1912, and by him rejected; and (4) that the petitioners were entitled to recover against the United States the sum of $353, for which judgment was accordingly entered (R. 13, 14). To this judgment the United States has sued out its writ of error.

SPECIFICATIONS OF ERROR.

The assignments of error, which are 8 in number, are all directed to propositions affecting the jurisdiction of the court, the sufficiency of the petition, and the constitutionality of the act.

It is insisted for the Government that the District Court erred in holding (1) that it had jurisdiction of the action; (2) that it need not be averred or proven that the tax was paid under protest; and (3) that the tax on charter parties imposed by the War Revenue Act was unconstitutional.

ARGUMENT.

I.

The District Court was without jurisdiction of the action.

1. The claim of the petitioners was presented to the Commissioner of Internal Revenue and by him rejected. The remedy of petitioners was therefore an action against the Collector of Internal Revenue and not against the United States.

This proposition is discussed at some length in the brief filed by the United States in *United States* v. *Emery, Bird, Thayer Realty Company*, No. 117 on the docket of this court for the present term. It is not necessary to repeat what is there said on the subject.

In brief, the Government contends that, as stated in *United States* v. *Savings Bank*, 104 U. S. 728, 734:

> * * * Until an appeal is taken to the commissioner no suit whatever can be maintained to recover back taxes illegally assessed or erroneously paid. If on the appeal the claim is rejected, an action lies against the collector (Rev. Stat., sect. 3226), and through him, on establishing the error or illegality, a recovery can be had. If the claim is allowed, and payment for any cause refused, suit may be brought directly against the Government in the Court of Claims. This, as it seems to us, is the logical result of the legislation of Congress upon the subject. A rejected claim may be prosecuted against the collector, and an allowed claim, not paid, may be sued for in the Court of Claims;

to which may now be added that by reason of the Tucker Act the District Court may exercise the same jurisdiction as that vested in the Court of Claims, and no more, and may entertain a suit against the United States *eo nomine* only when the claim has been allowed and not when it has been rejected. *Nichols* v. *United States*, 7 Wall. 122, 129; *United States* v. *Kaufman*, 96 U. S. 567; *United States* v. *Savings Bank*, *supra*; *Medbury* v. *United States*, 173 U. S. 492, 495; *City of Philadelphia* v. *Collector*, 5 Wall. 720, 731; *Arnson* v. *Murphy*, 109 U. S. 238, 243; *Sybrandt* v. *United States*, 19 Ct. Cl. 461; *Edison Electric Illuminating Co.* v. *United States*, 38 Ct. Cl. 208; *D. M. Ferry & Co.* v. *United States*, 85 Fed. 550.

This established rule is not altered by the act of July 27, 1912, upon which the petitioners rely.*

* The act, which is entitled "An Act extending the time for the repayment of certain war-revenue taxes erroneously collected," 37 Stat. 240, is as follows:

That all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected under the provisions of section twenty-nine of the act of Congress approved June thirteenth, eighteen hundred and ninety-eight, known as the war-revenue tax, or of any sums alleged to have been excessive, or in any manner wrongfully collected under the provisions of said act may be presented to the Commissioner of Internal Revenue on or before the first day of January, nineteen hundred and fourteen, and not thereafter.

SEC. 2. That the Secretary of the Treasury is hereby authorized and directed to pay, out of any moneys of the United States not otherwise appropriated, to such claimants as have presented or shall hereafter so present their claims, and shall establish such erroneous or illegal assessment and collection, any sums paid by them or on their account or in their interest to the United States under the provisions of the act aforesaid.

(See record, p. 2.) As stated by the report of the committee of the House of Representatives, where this act originated: "The sole object of this bill is to extend the time to January 1, 1914, for the filing of claims for refund of taxes erroneously assessed or illegally collected under the War Revenue Act of June 13, 1898." House Rep. No. 848, 62d Congress, 2d sess., which is printed as an appendix hereto.

It is clear that the second section of this act adds nothing new to the substantive rights of the claimants. Under the preexisting law (R. S., sec. 3228) all claims for the refunding of any internal revenue tax alleged to have been erroneously or illegally assessed or collected were required to be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued; and by section 3220 the Commissioner of Internal Revenue was authorized, "subject to regulations prescribed by the Secretary of the Treasury" (and acting therefore as his representative), "to remit, refund, and pay back all taxes erroneously or illegally assessed or collected," etc.;* while by section 3689 of the Re-

* Revised Statutes, sections 3220, 3226, and 3228, which are as follows:

SEC. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of

vised Statutes a permanent annual appropriation is made out of any moneys in the Treasury not otherwise appropriated "to refund and pay back duties erroneously or illegally assessed or collected under the internal revenue laws."

The section under discussion simply makes similar provision for the payment of these belated claims after they have been duly established. By its terms the Secretary of the Treasury is authorized and directed to pay out of any moneys of the United States not otherwise appropriated "to such claimants as have presented or shall hereafter so present their claims" (*i. e.*, to the Commissioner of Internal Revenue on or before the 1st day of January, 1914), and "shall establish such erroneous or illegal assessment or collection" (*i. e.*, shall establish the same before the Commissioner of Internal Revenue, whose duties in the premises are *quasi judicial*), any sums paid by them or on their account, etc.

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such sums of money as may be recovered against him in any court, for any internal taxes collected by him, with the costs and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty: *Provided*, That where a second assessment is made in case of a list, statement, or return which in the opinion of the collector or deputy collector was false or fraudulent, or contained any understatement or undervaluation, such assessment shall not be remitted, nor shall taxes collected under such assessments be refunded, or paid back, unless it is proved that said list, statement, or return was not false or

There is a wide difference between this provision, which is simply declaratory of rights and remedies already in existence as to those claims not previously barred, and such free gifts or bounties as those discussed in *Campbell* v. *United States*, 107 U. S. 407, and *Thacher* v. *United States*, 149 Fed. 902, cited and relied upon by the court below.

In the *Campbell* case drawbacks were deliberately allowed for the purpose of rendering certain imports free of duty, and the officers of customs in ascertaining their amount exercised purely ministerial functions, while the statute construed in the *Thacher* case required the refunding of legacy taxes upon all contingent beneficial interests not vested prior to July 1, 1902. In each instance Congress made a grant without regard to the legality or illegality of the original collection and necessarily, therefore, without regard to the voluntary or involuntary character of the original payment. A claim to the benefit so conferred might well be treated as a claim arising under the laws of the United States to the same extent as if it were

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fraudulent, and did not contain any understatement or undervaluation.

SEC. 3226. No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of (the) Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had

an appropriation of a specific sum; or, as said in the *Campbell* case, as soon as the amount was ascertained there arose an implied contract that the United States would refund to the importer the amount paid to the Government.

But in the case at bar no implied contract can arise under the act unless and until the claim shall have been presented to the Commissioner of Internal Revenue, and been by him allowed, and shall have thus become in the nature of an account stated between the claimant and the Government. Failing this, the claimant is left to seek his remedy by a suit against the collector as for money wrongfully had and received by him, while the collector, in turn, is protected by the provision made in section 3220 of the Revised Statutes for his reimbursement.

If it be objected that this latter procedure is unnecessarily circuitous and that the position of the Government could be no worse if suit were brought directly against it upon rejected as well as upon allowed claims, the answer is that these considera-

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therein: *Provided*, That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the Commissioner at any time within the period limited in the next section.

"SEC. 3228. All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued: *Provided*,

tions are for Congress and not for the courts. For the latter it is sufficient to know that so the law is written.

2. It does not affirmatively appear that the suit was brought in the district in which the petitioners reside.

By section 5 of the Tucker Act (which is expressly saved from repeal by section 297, Judicial Code, 36 Stat. 1168) suit is to be brought by the filing of a petition, duly verified, with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Act of March 3, 1887, c. 359, section 5, 24 Stat. 505, 506. This provision as to venue is mandatory. *Reid Wrecking Co.* v. *United States*, 202 Fed. 314, 316.

Upon elementary principles this jurisdictional fact of residence must appear from the petition. The sole averments in this regard in the instant case are those contained in the first clause of the petition in the following language (R. 1):

> Your petitioners, Frederick W. Hvoslef and William S. Walsh, together with William Bennett, were a copartnership engaged in the business of steamship brokers in the city of New York within the district aforesaid between the 1st day of July, 1898, and the 19th day of September, 1900, under the firm name of Bennett, Walsh and Company.

That claims which accrued prior to June six, eighteen hundred and seventy-two, may be presented to the Commissioner at any time within one year from said date. But

> Thereafter said William Bennett died, and your petitioners are the sole surviving members of said firm. Their business and partnership residence was and is in the Borough of Manhattan, city of New York, in said district. The said Hvoslef is the liquidating partner and has sole charge of the liquidation thereof.

It is submitted that neither the averment that the petitioners Hvoslef and Walsh, together with one William Bennett, were "engaged in the business of steamship brokers in the city of New York within the district aforesaid between the 1st day of July, 1898, and the 19th day of September, 1900," nor that "their *business and partnership* residence was and is in the Borough of Manhattan, city of New York, in said district," amount to an averment that the petitioners, or either of them, were at the time of bringing suit residents of the Southern District of New York.

By virtue of statutory provisions a corporation may acquire a legal residence at its principal place of business, or an officer may have an official residence at the place where his office is located, but we know of no statute that gives to an individual a residence for jurisdictional purposes at the place where he does business or where the partnership of which he is a member does business. There is no such thing known, we submit, as a "business or partnership

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nothing in this section shall be construed to revive any right of action which was already barred by any statute on that date.

residence," and the averment in the petition to this effect can not supply for jurisdictional purposes the entire absence of any averment as to the individual residence of the petitioners.

II.

The petition fails to state a cause of action.

1. There can be no recovery in the absence of any showing that the taxes were paid under protest.

The petition nowhere avers that the taxes in question were paid under protest. On the contrary, the court expressly finds that they were paid without protest (R. 11).

This being true, the petition must be held insufficient under the well-established rule that taxes voluntarily paid can not be recovered back, and that payments with knowledge and without compulsion are voluntary. *Chesebrough* v. *United States*, 192 U. S. 253; *United States* v. *Cuba Mail Steamship Co.*, 200 U. S. 488; *Elliott* v. *Swartwout*, 10 Pet. 137, 152; *Philadelphia* v. *Collector*, 5 Wall. 720; *Erskine* v. *Van Arsdale*, 15 Wall. 75.

The fact that the Treasury Department construed section 25 of the act of 1898 as "requiring" the payment of stamps upon charter parties for vessels engaged in the export trade does not constitute duress or make payment under protest unnecessary to a recovery. Some importance, however, seems to be attached by the court below in its findings to the fact that the petitioners were so "required" to make

payment; but this suggestion finds its complete answer in *United States* v. *Edmondston*, 181 U. S. 500.

In this case it was held that one who had been required by a receiver at a land office to pay more for land which he had preempted than he was legally bound to pay, and had made the payment without any question, protest, or notice, had no action to recover the excess. Mr. Justice Brewer, in delivering the opinion of the court, said (p. 504):

> * * * Some stress is placed by counsel on the word "required" in the second finding, but we think that it means simply that the Government officials charged him four hundred dollars. To that charge he made no objection. Take any case in which application is made to an official for services or for the purchase of property; when he names the fee or the price the applicant ordinarily without question pays it. In a certain sense the applicant is required to pay; that is, the sum which he pays is the sum demanded of him. It may be a rightful or a wrongful demand. When it is demanded it is required. If he pays without objection, notice or protest it is simply in response to the call upon him for the particular sum, and, as we have heretofore said, between individuals it would be regarded as a voluntary payment.

Equally beside the mark, so far as the question of duress or compulsion is concerned, are the further statements in the findings of fact that the War Revenue Act of 1898 contained provisions declaring the charter parties in question to be invalid unless

stamped, and imposing fines and imprisonment for failure to affix the prescribed stamps (R. 11). These and like considerations are effectually disposed of by the opinions in the cases of *Chesebrough* v. *United States* and *United States* v. *New York & Cuba Mail Steamship Company, supra;* which are believed to be controlling and decisive of the case at bar.

In the latter case (200 U. S., p. 494), Mr. Justice McKenna quotes with approval the standard of a voluntary payment announced in *R. R. Co.* v. *Commissioners,* 98 U. S. 541, as follows:

> * * * "Where a party pays an illegal demand, with full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefore, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and can not be recovered back."

Nothing less than this, no danger less imminent, or force less direct, can convert a voluntary into an involuntary payment. As was said in *Oceanic Steam Nav. Co.* v. *Tappan,* 16 Blatchf. 296, 300, by District Judge Wallace:

> It is stated, in general terms, in some of the decisions, that, where money is paid to a public officer, upon an unlawful demand, to save the person paying from the infliction, under color of authority, of great or irreparable injury, from which he can only be saved by making the payment, such payment is made under an urgent and immediate necessity and

> may be recovered back. But, it will be found that none of these decisions were in cases where the injury apprehended by the party paying could only be inflicted by the decision of a court in favor of the validity of the claim made against him. There can not be an immediate and urgent necessity for the payment of a demand which can only be enforced by the decision of a court of justice.

2. The act of July 27, 1912, does not dispense with protest or duress as a condition precedent to a recovery.

The court below was of opinion (R. 8) that by reason of the act of July 27, 1912, *supra*, the protest was no longer a condition to recovery. In its opinion attention is called to the fact that the act imposes no express condition as to protest; but says that "all" claims for taxes illegally assessed might be presented, and that in order to make it the duty of the Secretary to pay, the claimants, after presenting their claims, were required to establish only "such erroneous or illegal assessments and collection."

This argument again is fully met by the *Chesebrough* and *Cuba Mail Company* cases above cited.

In the *Chesebrough* case the recovery was sought under Revised Statutes, section 3220, *supra*, authorizing the Commissioner of Internal Revenue "to remit, refund, and pay back all taxes * * * that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected." In commenting on this statute the court said (p. 264):

> It is argued that the provisions of section 3220 for the repayment of judgments against

> the collector rendered protest or notice unnecessary for his protection, but it was clearly demanded for the protection of the Government in conducting the extensive business of dealing in stamps, which were sold and delivered in quantities, and without it there would not be the slightest vestige of involuntary payment in transactions like that under consideration. And we find no right of recovery, expressly or by necessary implication, conferred by statute, in such circumstances.

In the *Cuba Mail Company* case the petitioner insisted that it had a right of action under the Tucker Act even though the stamps were purchased without any duress or coercion, because the act of May 12, 1900, 31 Stat. 177, which the petitioner there relied on, provided—

> That the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, may, upon receipt of satisfactory evidence of the facts, make allowance for or redeem such of the stamps, issued under authority of law, to denote the payment of any internal revenue tax, as may have been spoiled, destroyed, or rendered useless or unfit for the purpose intended, or for which the owner may have no use, or which through mistake may have been improperly or unnecessarily used, or where the rates or duties represented thereby have been excessive in amount, paid in error, or in any manner wrongfully collected.

This statute, it will be seen, not only imposed no condition as to protest, but embraced cases in which

there could not possibly have been protests, but Mr. Justice McKenna, in delivering the opinion of the court, said (p. 495):

> The argument is that by this provision "the question of duress or compulsion is taken entirely out of the case," because in most of the instances enumerated "it is inconceivable that there should be any protest or duress." * * * It certainly does not follow that, because in some instances, protest or duress can not exist, that they can not exist in other cases, nor that the statute intended to destroy the difference between voluntary and involuntary payment of taxes.

To give to the statute of 1912, which is relied upon by the petitioners, a different construction from that which was given the analogous statutes which were involved in these cases would be to ignore a recognized rule of statutory construction. In *Shaw* v. *Railroad Company*, 101 U. S. 557, it was said (p. 565):

> * * * No statute is to be construed as altering the common law, farther than its words import.

And in *Northern Securities Co.* v. *United States*, 193 U. S. 197, Mr. Justice Brewer, in a concurring opinion, said (p. 361):

> * * * Whenever a departure from common law rules and definitions is claimed, the purpose to make the departure should be clearly shown.

True, it was said in *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 17, that—

> The dogma as to the strict construction of statutes in derogation of the common law only amounts to the recognition of a presumption against an intention to change existing law;

but there is such a presumption, and that presumption confronts the petitioners with full force when they contend that it was intended by the act of 1912 to destroy the difference between voluntary and involuntary payment of taxes.

The case of *Thacher* v. *United States*, 149 Fed. 902, which is cited by the court below, has no application to the case at bar for the reason hereinbefore pointed out that the statute therein construed required the refunding of all legacy taxes paid on contingent interests irrespective of their legality, and even though rightfully collected and voluntarily paid, while the act of 1912, upon which the petitioners rely, provides for the proving and payment of those claims only which have been illegally assessed and collected. Similar considerations dispose of the case of *Campbell* v. *United States*, 107 U. S. 407.

3. The petition does not show that the claim for refunding was presented to the Commissioner of Internal Revenue within the statutory time.

The taxes in question are alleged to have been exacted between the 1st day of July, 1898, and the 19th day of September, 1900. The claim for their

refunding was presented to the Commissioner of Internal Revenue on or about the 26th day of October, 1912.

According to section 3228 of the Revised Statutes all claims for such refunding are required to be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued. Petitioners, however, claim that they are within the purview of the act of July 27, 1912, *supra*, and therefore may present their claims on or before the 1st day of January, 1914.

But the express language of this act is limited to the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected under the provisions of section 29 of the War Revenue Act (being the section with reference to legacies and inheritances), while the tax paid by the petitioners was assessed and collected under the provisions of section 25 of the same.

The subsequent language in the first section of this refunding act "or of any sums alleged to have been excessive, or in any manner wrongfully collected under the provisions of said act" can properly be held to refer only to those provisions to which the act itself is directed, to wit, the provisions of section 29. That they were not intended to convert the act into an omnibus bill covering all claims arising under any section whatever of the War Revenue Act is conclusively shown by the report of the House com-

mittee, printed as an appendix herewith, in which it is said:

> The particular taxes sought to be refunded under the authority of this legislation were those collected on legacies and inheritances, in accordance with section 29 of the act above mentioned.

III.

The tax which was imposed upon charter parties was not unconstitutional.

1. The tax was not unconstitutional merely because it may have been measured by the cargo space of vessels employed in some instances in the export trade.

In the opinion of the court below, the provision in the War Revenue Act of 1898 imposing a tax on charter parties violated the constitutional provision that "no tax or duty shall be laid on any articles exported from any State" for the reason that a charter party is a document by which the cargo space of a vessel is engaged and enables export articles to be transported, so that a tax upon it is a burden upon exportation as much as if it were imposed upon the articles carried in the vessels chartered (R. 6–7).

That this stamp tax was not a tax upon the articles carried as asserted by the court below appears at once by the fact that the amount of the tax was measured by the tonnage of the vessels chartered and not by the value of the goods to be carried, nor even by the quantity or tonnage of the goods carried, for, in some cases, the lading of a chartered vessel might not be exclusively export

goods, and in others it might conceivably sail without lading.

And, even if the tax was upon cargo space, it does not follow that the tax was upon the "articles exported" within the meaning of those words in the constitutional provision. All tonnage taxes or duties are equally, and even more directly than a tax on charter parties, taxes on tonnage space, and yet they may lawfully be imposed by Congress. *State Tonnage Tax Cases*, 12 Wall. 204. It was there said (p. 216):

> Tonnage duties, to a greater or less extent, have been imposed by Congress ever since the Federal Government was organized under the Constitution to the present time. * * * Undisputed authority exists in Congress to impose such duties.

Tonnage, in our law, is a vessel's internal cubical capacity in tons of one hundred cubic feet each, to be ascertained in the manner prescribed by Congress. Tonnage duties are duties upon vessels in proportion to their capacity. *Inman S. S. Co.* v. *Tinker*, 94 U. S. 238, 243; *State Tonnage Tax Cases, supra*, p. 225. A duty on tonnage within the meaning of the Constitution is a charge upon a vessel, according to its tonnage, as an instrument of commerce, for entering or leaving a port, or navigating the public waters of the country. *Huse* v. *Glover*, 119 U. S. 543, 549.

But it has never been held that, because a tonnage tax is a tax upon vessels as instruments of commerce, such a tax is unconstitutional so far as or because it is

levied upon vessels employed in the export trade. A vessel in which goods are exported or imported is not itself either an export or import. Tariff acts which lay duties upon "articles" and upon "goods, wares, and merchandise" imported from foreign countries do not apply to vessels brought into the waters of the United States. *The Conqueror*, 166 U. S. 110, 114. On the other hand, a vessel in which goods are carried to a foreign country is no more exported than are goods placed on board a vessel bound for a foreign port to be used and consumed on board during the voyage and which are so used and consumed; such goods have been held not to be exported. *Swan & Finch Co.* v. *United States*, 190 U. S. 143. And it has been held that the provision of the Constitution that "no tax or duty shall be laid on articles exported from any State," does not apply to the imposition of tonnage taxes on foreign vessels. *Aguirre* v. *Maxwell*, 3 Blatchf. 140 (1 Fed. Cas. No. 101).

Tonnage duties, although usually exacted when the ship or vessel enters the port, apply to vessels carrying exports as well as those carrying imports, for practically every vessel which brings goods into our ports carries other goods away.

It would seem to follow from this, and the fact that tonnage taxes or duties may lawfully be levied by Congress, that, even if the stamp on charter parties was a tax on the cargo space of vessels or on vessels as instruments of commerce, it was not for

that reason unconstitutional so far as it applied to vessels carrying exports.

There are yet other analogies between the stamp tax on charter parties and tonnage taxes or duties which should, perhaps, be noted.

The stamp act was purely a revenue-producing measure. That, however, may be the sole function of a statute laying a tonnage tax. A duty on tonnage, it has been said, is as much a tax as a duty on imports and exports; while a duty on tonnage may be imposed with a view to the regulation of commerce, it may also be imposed with a view to revenue. *Gibbons* v. *Ogden*, 9 Wheat. 1, 202; *State Tonnage Tax Cases, supra*, p. 215.

The tax on charter parties, being payable whenever a vessel was chartered, was collectible at irregular intervals. Tonnage duties have also been so collected. Under the act of July 14, 1862, section 15, 12 Stat. 558, which provided that all vessels which "shall be entered in any custom house, from any foreign port or place, shall pay a tax or tonnage duty," etc., it was held that tonnage was to be paid upon their entry at a custom house *as often as they entered*, and the law stood thus until the act of March 2, 1867, 14 Stat. 471, 484, which, by section 33, provided that vessels engaged in foreign commerce were required to pay tonnage "but once within the year." 14 Op. Atty. Gen. 450.

The stamp tax was graded in accordance with the tonnage of the vessels chartered. A duty on tonnage, in the most obvious and general sense of the words,

is a duty proportioned to the tonnage of the vessel. But it may be any duty upon a ship, whether a fixed sum upon the whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty. *Steamship Co.* v. *Portwardens*, 6 Wall. 31, 34–35.

Since, then, tonnage duties, to which the tax here in question bears so close a resemblance, and which are necessarily a tax upon vessels employed in the export as well as those employed in the import trade, have uniformly been held to be within the taxing power of Congress, it would seem that the tax on charter parties was also within that power.

2. The tax only incidentally and remotely affected articles exported.

The section of the act imposing the tax applied to a charter party of every vessel having a registered tonnage. It applied to vessels carrying only passengers. And if, as has been held, the words "registered tonnage" were applicable to every vessel, whether registered, enrolled, or licensed (*Wheaton* v. *Weston*, 128 Fed. 151), the act applied to charter parties of coasting and fishing vessels, of vessels plying in inland waters and even of yachts intended and used only for pleasure, for many vessels of these classes are registered, enrolled or licensed. In fact, if the decision in the above-cited case is sound, the act applied to the major part of all vessels except canoes, small boats, launches, and other undocumented vessels which are not used or are not capable of being

used as a means of transportation on water as the word vessel is defined by statute (Rev. Stat., sec. 3).

The act did not apply to all vessels employed in the export trade, for it did not apply to vessels not under charter but employed in that trade by their owners.

It did not even apply to all vessels chartered for the purpose of exporting cargoes from the United States, for it did not apply to charter parties executed abroad.

The tax, therefore, affected cargoes exported only incidentally and to a limited extent.

Clearly, the burden imposed upon the export trade by this tax was not nearly so great as the burden imposed by tonnage duties.

An act of Congress in regulation of interstate commerce which has a mere incidental effect upon exportations does not come within the constitutional prohibition of a tax or duty on articles exported. *Armour Packing Co.* v. *United States*, 209 U. S. 56, 79–80; *C. B. & Q. Ry. Co.* v. *United States*, 209 U. S. 90.

The tax was no more unconstitutional because it affected exports incidentally than the law of a State is unconstitutional because it affects interstate commerce, when that is not its primary purpose and it is enacted in the exercise of the police power. *McLean* v. *Denver & Rio Grande R. R. Co.*, 203 U. S. 38, 50.

The application of the principle applied in this class of cases to cases similar to the one at bar was

suggested by Mr. Justice Brewer in delivering the opinion of the court in *Fairbank* v. *United States*, 181 U. S. 283, 305–306.

3. The tax was not a tax on articles exported.

The constitutional provision prohibits any tax on "articles exported." Conceding, for argument's sake, that a tax which affects "articles exported," in no matter how remote or incidental a sense, may be obnoxious to this provision, still it must be made to appear that those things which it so affects are at the time when the tax is paid "exports" in the constitutional sense.

In the present case, on the contrary, the goods which were to be carried on the vessels chartered were of course not on board the vessels at the time when the charter parties were executed and the revenue stamps affixed, and no taxes were then paid on articles exported. It can at most be claimed only that taxes were paid on goods intended for exportation and which were subsequently exported.

But goods intended for exportation are not exports. *Turpin* v. *Burgess*, 117 U. S. 504. In the latter case it was held, following *Pace* v. *Burgess*, 92 U. S. 372, that the provision of the Constitution (Art. 1, sec. 9, par. 5) forbidding a tax or duty on articles exported means a duty levied on goods in course of exportation, because of their intended exportation, and not a tax or duty on property while contained in a factory, which is levied on every such article without regard to whether or not it be for exportation.

In *Cornell* v. *Coyne*, 192 U. S. 418, it was held that the fact that a quantity of "filled cheese" was manufactured under a contract to export, and was in fact exported, did not exempt it from a tax on all filled cheese which should be manufactured, on the ground that the tax was prohibited by a constitutional provision against the laying of any tax or duty on articles exported.

And goods intended for exportation are not exports, even though they have been partially appropriated for exportation and have been carried to, and deposited at, a depot for that purpose. *Coe* v. *Errol*, 116 U. S. 517. It was held in this case that timber which is cut in the forest and intended for exportation, and partially appropriated for that purpose by being deposited at a place or port of shipment within the State, is not an export.

Goods do not become exports until they are actually started in course of transportation to their destination. *Coe* v. *Errol*, 116 U. S. 517, 525; *Turpin* v. *Burgess*, 117 U. S. 504, 506.

It is a matter of considerable difficulty to say when the exportation of goods begins. Certainly there is nothing in the petition in this case to the effect that the transportation of the goods which were exported in the chartered vessels had commenced at the time when the charter parties were executed and the revenue stamps affixed. It is not alleged that the goods had even been started on their way to a port from which they were to be

carried abroad. In *Thompson* v. *United States*, 142 U. S. 471, the court, in declaring to be untenable the contention of the defendant that distilled spirits for which he had executed an exportation bond were in process of exportation after the execution of the bond, said (p. 477):

> * * * Exportation is defined to be the act of carrying or sending merchandise abroad, and it can not be considered as beginning until the spirits are removed from the warehouse for that purpose. The execution of the bond is evidence of nothing more than an intention to export. As well could the taking out of a passport, or the engagement of passage upon a trans-Atlantic steamer, be regarded as the commencement of a journey to foreign parts. Indeed, it may admit of doubt whether exportation can be considered as beginning until the merchandise leaves the port of export for a foreign country.

4. The cases of Fairbank v. United States and United States v. New York and Cuba Mail S. S. Co. are easily distinguishable from the case at bar.

In *Fairbank* v. *United States*, which was cited by the court below in support of its decision, it was held that a discriminating stamp tax upon bills of lading covering goods to be carried to a foreign country was a tax upon exports within the meaning of the Constitution. The statute challenged in that case imposed "on bills of lading for any goods, merchandise, or effects, to be exported from any port or place in the United States to any foreign port or

place" a tax of ten cents. The act of 1898, which imposed the tax, made a discrimination between an ordinary internal bill of lading and that upon one having respect solely to matters of export. An ordinary bill of lading was charged one cent; an export bill of lading ten cents.

This tax did not affect exports merely incidentally as does the tax on charter parties; the statutory provision referred specifically, and the tax was restricted, to bills of lading for goods to be exported, while the provision here in question referred, not to charter parties of vessels engaged in the export trade, but to all charter parties.

The tax on bills of lading, because of the usage of the business world, affected practically all exports, while the tax on charter parties, as is hereinbefore shown, affected only a part, probably a small part, of exports.

But the distinction between this case and that most clearly appears when we consider that bills of lading bear a far more intimate relation to the goods which they cover than do charter parties to goods carried in the chartered vessels. Bills of lading are instruments of commerce, because they stand for the articles included therein. Fuller, C. J., in *Lottery Case*, 188 U. S. 321, 369. In *The Carlos F. Roses*, 177 U. S. 655, Shiras, J., said (p. 689):

> The exigencies of trade have called a class of instruments into being which are substantially acknowledgments by public or private agents that they have received merchandise,

> and from whom or on whose account; and usage has made the possession of such documents equivalent to the possession of the property itself. Among them the most notable is the bill of lading.

Bills of lading, it has been said in effect, are regarded as so much cotton, grain, iron, or other articles of merchandise; they are symbols of the ownership of the goods they cover, and the merchandise is very often sold or pledged by the transfer of the bills. *Shaw* v. *Railroad Co.*, 101 U. S. 557, 565; *Friedlander* v. *Texas & Pacific Ry. Co.*, 130 U. S. 416, 424.

Furthermore, since bills of lading are customarily executed only after the goods are on board the vessel or vehicle by which they are to be transported, or at least after they have been delivered to the carrier for transportation, the tax did not affect goods which were merely intended for exportation, or which had been set aside for exportation, but goods which were in the actual process of exportation. This distinction is adverted to in *Cornell* v. *Coyne*, 192 U. S. 418, cited and considered above, wherein it is said (p. 429) that there is nothing in the case of *Fairbank* v. *United States* inconsistent with the views therein expressed. And in *United States* v. *Chavez*, 228 U. S. 525, citing the *Fairbank* case, it was said that (pp. 529–530)—

> for the purposes of the provisions of §9, Article I, of the Constitution, prohibiting the laying by Congress of a tax or duty "on articles exported from any State," and of §10, Article I, forbidding any State, without the consent of Con-

> gress, to "lay any imposts or duties on imports or exports," a shipment is considered as the initiation of export so as to bring the goods shipped within the protection of the constitutional safeguards.

The case of *United States* v. *New York and Cuba Mail S. S. Co., supra*, was also cited by the court below in support of its decision. That case involved the constitutionality of a tax, imposed by this same War Revenue Act of 1898, on "manifests for customhouse entry or clearance of the cargo of any ship, vessel, or steamer for a foreign port," according to the registered tonnage of the vessels. It appears from the opinion of the District Court that the constitutionality of the tax was alone submitted for decision, and the court, upon the authority of *Fairbank* v. *United States*, held that the tax was unconstitutional. 125 Fed. 320. In the Supreme Court, the Government very properly conceded that the stamp tax on manifests was a tax on articles exported in the same sense in which the tax on bills of lading was a tax on articles exported.

This case is of course distinguishable on the same grounds that the *Fairbank* case has been distinguished from the case at bar. It is only necessary to have in mind the nature of a manifest to discern the distinction between a tax on manifests of cargoes of vessels for foreign parts and a tax on all charter parties. The nature of manifests was described by District Judge Holt as follows (125 Fed. 320):

> I am unable to see any difference in principle between a stamp tax on a manifest and a stamp

tax on a bill of lading. A manifest is a declaration of the entire cargo; a bill of lading is a declaration of a specific part of the cargo. A manifest is essentially a summary of all the bills of lading. If there is any distinction, it seems to me that the constitutional prohibition of a tax on a foreign bill of lading applies with still greater force to a tax on a manifest. Previous to the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]) there was, so far as I am aware, no statute of the United States requiring bills of lading to be given. They were universally given, but they were a mere matter of business convenience, and were based exclusively on contract. The statutes of the United States, however, have always required that a sworn manifest be furnished by the master upon the clearance of any vessel from this country for a foreign port. Rev. St. U. S. §4197 [U. S. Comp. St. 1901, p. 2840]. A manifest is one of the ship's papers which must be presented to the collector upon the entry of any vessel into the United States. Rev. St. U. S. §2790 [U. S. Comp. St. Supp. 1903, p. 1869]. It is a part of the ship's papers, essential, on all voyages, for the protection of the ship and the owners of the cargo, which it is the duty of a master to take on board and carefully preserve. 2 Parsons on Shipping, 3. A voyage made without the regular ship's papers is presumably illegal. In case of a seizure in time of war, the absence of ship's papers is presumptively an adequate ground for condemnation. 2 Parsons on Shipping, 476. Prize

cases, when no claimant appears, are ordinarily heard upon the ship's papers and the evidence taken in preparatory. 2 Parsons on Shipping, 473. Any concealment or spoliation of ship's papers is a fact of great weight in prize cases. 2 Parsons on Shipping, 475. In short, while a bill of lading is ordinarily merely a convenient commercial instrument, a manifest of the cargo is absolutely essential to the exportation of property in vessels at all. Congress could absolutely put an end to any exportation whatever by a sufficiently high tax on manifests, if it had the power to impose such a tax. If, therefore, a stamp tax on a bill of lading is a tax upon the property exported, a stamp tax on a manifest seems to me to be still more clearly such a tax.

CONCLUSION.

The judgment should be reversed and the cause remanded with direction to dismiss the petition.

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